

In the Supreme Court of the United States

OCTOBER TERM, 1990

MICHAEL T. WESTMORELAND, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF MILITARY APPEALS**

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

THOMAS W. OSBORNE
Cmdr., JAGC, USN

THOMAS D. MILLER
Maj., USMC
Appellate Government Counsel
Appellate Government Division, NAMARA
Washington, D.C. 20374-1111

QUESTION PRESENTED

Whether the court-martial panel in this case was properly instructed that three-fourths of the panel members must concur in a sentence of life imprisonment, as required by Article 52(b)(2) of the Uniform Code of Military Justice, 10 U.S.C. 852(b)(2), and Rule for Courts-Martial 1006(d), *Manual for Courts-Martial, United States—1984*.



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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-15a) is reported at 31 M.J. 160. The opinion of the Navy-Marine Corps Court of Military Review (Pet. App. 16a-34a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 25, 1990. The petition for a writ of certiorari was filed on December 21, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a member of the United States Marine Corps, was convicted by a general court-martial of conspiracy to commit murder and premeditated mur-

der, in violation of Articles 81 and 118 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 881 and 918. The court-martial sentenced petitioner to confinement for life, a dishonorable discharge, total forfeiture of pay, and a reduction in rank. The convening authority approved the findings and sentence. The Navy-Marine Corps Court of Military Review affirmed. The Court of Military Appeals granted discretionary review and affirmed.

1. Corporal Darrell Morelock and his wife, Connie, had been experiencing serious marital difficulties. Petitioner, a fellow Marine who was nicknamed "Mike the Knife" because of his collection of knives, offered to kill Connie for a price. Morelock accepted petitioner's offer. For almost three months, petitioner, Morelock, and Morelock's girlfriend, Melissa Bates, made plans to murder Connie. On the evening of July 28, 1984, the final plan was executed. Morelock left the Morelocks' daughter with Bates. Petitioner and Morelock then drove Connie to a secluded pond on the pretense that Connie was to have sex with petitioner as retaliation for Morelock's adulterous affairs. Morelock left petitioner and Connie by the pond and retreated to the car to wait. Petitioner returned to the car shortly thereafter and said "it's done." The two men then left. Two days later, Connie's body was found. She had been stabbed 30 times in the hands, arms, legs, back, chest, and neck. Pet. App. 18a-23a.¹

¹ Morelock was the prosecution's primary witness at trial. He testified about how he and petitioner planned Connie's murder, and how, on July 28, they drove Connie to the pond and carried out the plan. Tr. 1287-1390, 1394-1568. The testimony of Melissa Bates and various receipts introduced into evidence by the prosecution supported Morelock's testi-

2. A court-martial is a bifurcated proceeding with separate guilt and sentencing stages, and the members of the court-martial panel must separately decide each question. When capital punishment is the mandatory penalty for a charged crime, the panel members must be unanimous in order to convict a servicemember of that offense. Art. 52(a)(1), UCMJ, 10 U.S.C. 852(a)(1). For any other offense, a servicemember may be convicted by a two-thirds vote of the panel. Art. 52(a)(2), UCMJ, 10 U.S.C. 852(a)(2). The sentencing stage then commences. After hearing evidence in aggravation and mitigation, the panel votes on an appropriate sentence. In order to impose a capital sentence, the panel must be unanimous. Art. 52(b)(1), UCMJ, 10 U.S.C. 852(b)(1). To impose a sentence of life imprisonment or a term of confinement for more than 10 years, three-fourths of the panel members must agree. Art. 52(b)(2), UCMJ, 10 U.S.C. 852(b)(2). The panel members must agree on such a punishment even if life imprisonment is the mandatory penalty for an offense, as in the case of premeditated murder. Rule for Courts-Martial 1006(d), *Manual for Courts-Martial, United States—1984 (Manual)*. Any other sentence may be imposed by a two-thirds vote of the panel. Art. 52(b)(3), UCMJ, 10 U.S.C. 852(b)(3).

mony. Tr. 1637-1655; GXs 33-34, 36-37, 47-51, 55, 84-88. Also supportive was the evidence presented by Corporal John Manley, who testified that, on a Friday evening during July 1984, petitioner said he was going out to play "Mike the Knife" and make some money. Manley identified a Gerber knife he saw petitioner place in his back pants pocket before he left that night. That knife was the same type of knife that the pathologist who performed the autopsy identified as having inflicted Connie Morelock's fatal wounds. Tr. 1220, 1709, 1712-1713; GX 104.

In this case, the court-martial members were instructed at the guilt stage of the trial, without defense objection, that a two-thirds majority vote was required to convict petitioner of each of the charged offenses. Tr. 1921-1924. The panel found petitioner guilty of one specification of conspiracy to commit murder and one specification of premeditated murder. Tr. 2039-2040. During the sentencing stage of the trial, again without objection by the defense, the panel members were instructed that life imprisonment was mandated, although all other aspects of the sentence, such as the type of discharge (if any) that petitioner should receive and the amount of pay (if any) that he should forfeit, were open for their consideration. Tr. 2064-2067, 2070-2071. The panel members were also instructed to vote on each proposed sentence in its entirety beginning with the least severe proposal until they reached the required three-fourths concurrence. Tr. 2068. The members imposed a sentence that included confinement for life. Tr. 2072.

ARGUMENT

Petitioner argues that his sentence is invalid because the trial judge's instruction that life imprisonment was a mandatory sentence for premeditated murder failed to give the panel members the option to select another period of confinement and therefore did not comply with Rule 1006(d), *Manual*, which requires a three-fourths vote for sentences that include confinement for life. Pet. 5-10. Petitioner's contention does not warrant review by this Court, for several reasons.

1. Petitioner did not properly preserve his claim because he did not object at trial to the trial judge's instruction that life imprisonment is a mandatory

sentence for premeditated murder and that the panel members were to vote on each proposed sentence in its entirety until they reached the three-fourths concurrence. In fact, during discussions on the sentencing instructions petitioner specifically agreed with the trial judge and the prosecutor that the panel members should be instructed that life imprisonment was mandated and that the panel members were required to concur on any sentence by a three-fourths vote in accordance with Rule 1006(d), *Manual*. Tr. 2050-2051. Moreover, petitioner did not raise his claim in either the Navy-Marine Corps Court of Military Review or in the Court of Military Appeals. Accordingly, petitioner has waived his claim. See, e.g., *Solorio v. United States*, 483 U.S. 435, 451 n.18 (1987).²

2. Petitioner contends that the decisions of the Court of Military Appeals in this case and in *United*

² For another reason as well, it is not clear that this question is subject to review in this Court. The statutes authorizing this Court to review by a writ of certiorari the judgments of the Court of Military Appeals, 10 U.S.C. 867(h) (1) and 28 U.S.C. 1259(3), restrict this Court's certiorari jurisdiction to "decisions" of the Court of Military Appeals. Section 867(h) (1) of Title 10 further provides that this Court may not review by certiorari "any action of the Court of Military Appeals in refusing to grant a petition for review." The Court of Military Appeals has the statutory authority to limit its decisions in any case to less than all of the questions presented by a defendant. 10 U.S.C. 867(d). Petitioner did not present to the Court of Military Appeals the jury instruction question that he now raises in his certiorari petition. Accordingly, it is not clear that that court rendered a "decision[]" on the question presented in the petition, within the meaning of 10 U.S.C. 867(h) (1).

That question does not require an answer in this case, however, since the question presented in the certiorari petition does not warrant review by this Court in any event.

States v. Shroeder, 27 M.J. 87 (C.M.A. 1988), cert. denied, 489 U.S. 1012 (1989), conflict with the decision of the Tenth Circuit Court in *Dodson v. Zelez*, 917 F.2d 1250 (1990), which held that a trial judge must instruct the panel members that three-fourths of them must agree to impose a mandatory sentence of life imprisonment. Petitioner's assertion is wrong because this case and *Dodson* are factually and legally distinct.

In *Dodson*, the defendant had been convicted of premeditated murder and felony murder, but the trial judge did not instruct the court-martial panel members on the three-fourths majority vote requirement prior to their deliberations on sentence. 917 F.2d at 1251, 1261. The Tenth Circuit held that the failure to instruct the panel on that point was an error because Rule 1006(d) requires that the panel be so instructed in every case in which life imprisonment is a possible penalty, even in cases in which that sentence is mandatory. 917 F.2d at 1260-1261. By contrast, in this case, as in *Shroeder*, 27 M.J. at 87-88, the trial judge did instruct the panel members at sentencing concerning the three-fourths majority vote requirement. The issue in *Shroeder* concerned the judge's additional instruction that any sentence adjudged by the panel members must include the mandatory punishment of life imprisonment, which the Court of Military Appeals held was an appropriate instruction. *Id.* at 88-90. The Tenth Circuit noted these distinctions between the *Dodson* and *Shroeder* cases, saw no infirmity in the rule adopted in *Schroeder*, and concluded that *Shroeder* supported its interpretation that the panel must be instructed about the three-fourths majority vote requirement, even in cases of a mandatory sentence. *Dodson v. Zelez*, 917 F.2d at 1260. Accordingly, the decision

below and in *Schroeder* do not conflict with the Tenth Circuit's decision in *Dodson*.³

3. In any event, the trial judge's sentencing instructions comported with the case law and Rule 1006(d), *Manual*. The panel members were in-

³ Petitioner makes the ancillary claim that Articles 52 (b) (2) and 118 of the UCMJ, 10 U.S.C. 852 (b) (2) and 918, should be read together to require a three-fourths vote to convict a defendant of an offense that carries a mandatory sentence of ten or more years' imprisonment. Pet. 8-10. That claim is not properly before the Court, however, because petitioner has not included it as a question presented, because petitioner did not object to the two-thirds majority vote instruction given at his trial, and because petitioner did not raise that claim in either military appellate court. In addition, the military and civilian courts have consistently held that only a two-thirds majority vote is necessary to convict a defendant, even when life imprisonment is the mandatory penalty for an offense. *Dodson v. Zelez*, 917 F.2d at 1255-1256; *McKinney v. Warden*, 273 F.2d 643, 644 (10th Cir. 1959), cert. denied, 363 U.S. 816 (1960); *Anderson v. Hunter*, 177 F.2d 770, 771 (10th Cir. 1949); *Stout v. Hancock*, 146 F.2d 741, 745 (4th Cir. 1944), cert. denied, 325 U.S. 850 (1945); *Brown v. Hiatt*, 81 F. Supp. 647, 650 (N.D. Ga. 1948), aff'd on other grounds, 175 F.2d 273 (5th Cir. 1949), rev'd on other grounds, 339 U.S. 103 (1950); *Thompson v. Sanford*, 79 F. Supp. 584, 585 (N.D. Ga. 1946); *Hurse v. Caffey*, 59 F. Supp. 363, 364-365 (N.D. Tex. 1945); *United States v. Walker*, 7 C.M.A. 669, 673-675, 23 C.M.R. 133, 137-139 (1957); *United States v. Morphis*, 7 C.M.A. 748, 752-754, 23 C.M.R. 212, 216-218 (1958). See *Ex parte Campo*, 71 F. Supp. 543, 545 (S.D.N.Y.), aff'd mem. *sub nom. Campo v. Swenson*, 165 F.2d 213 (2d Cir. 1947). See also *Dodson v. Zelez*, 917 F.2d at 1262, and *Mendrano v. Smith*, 797 F.2d 1538, 1542-1547 (10th Cir. 1986) (both upholding constitutionality of two-thirds majority vote requirement for conviction). This Court has also declined to review that claim on past occasions. See *Reliford v. United States*, cert. denied, 488 U.S. 1009 (1989); *Dodson v. United States*, cert. denied, 479 U.S. 1006 (1986).

structed to vote on each proposed sentence in its entirety until they reached the three-fourths concurrence. Tr. 2068. This instruction is consistent with the holding in *Dodson v. Zelez* and with Rule 1006(d), *Manual*, which requires all panel members to vote on each proposed sentence in its entirety, beginning with the least severe penalty, until three-fourths of the members concur on a sentence. The panel was also instructed that life imprisonment was mandated, although all other aspects of the sentence were open for their consideration. Tr. 2064-2067, 2070-2071. As discussed above, that instruction is permissible under the Court of Military Appeals' decision in *United States v. Shroeder*, which the Tenth Circuit found was not inconsistent with its holding in *Dodson v. Zelez*. Accordingly, the trial judge in petitioner's case, by including the instruction that the sentence must include life imprisonment, satisfied the requirement of Rule 1006(d), *Manual*, that three-fourths of the panel members must concur in a sentence that includes life imprisonment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

THOMAS W. OSBORNE
Cmdr., JAGC, USN

THOMAS D. MILLER
Maj., USMC
Appellate Government Counsel
Appellate Government Division, NAMARA

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